

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Computer III Further Remand Proceedings:)

Bell Operating Company Provision)
of Enhanced Services)

CC Docket No. 95-20

COMMENTS OF U S WEST, INC.

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SUMMARY

In this docket the Federal Communications Commission seeks comment on whether to reimpose Computer II structural separation on the Regional Bell Operating Companies (“RBOC”). The docket is occasioned by the reversal of the latest set of nonstructural safeguards by the Ninth Circuit Court of Appeals, this time on the basis that the Commission did not adequately explain why it had not included “fundamental unbundling” as a safeguard against network access discrimination by the RBOCs when they offered integrated enhanced services.

In these comments, U S WEST focuses on the actual performance of the enhanced service industry during the period when integrated enhanced services were actually offered within the regulatory open network/nonstructural safeguard environment. The record is dramatic. Based upon studies by independent experts, it is demonstrated that integrated RBOC enhanced service operations (particularly voice messaging service) have enhanced competition, improved consumer choice, and resulted in service to customers who would not otherwise be served in the absence of integrated RBOC operations. Moreover, the nonstructural safeguards have been successful in preventing either access discrimination or cross-subsidization, and the market based unbundling required by the ONA rules is a superior interconnection tool for enhanced service providers than the undefined “fundamental unbundling” which the Ninth Circuit demanded that the Commission analyze and consider.

In short, the record establishes conclusively that integrated RBOC enhanced service operations serve the public interest. This fact must guide the Commission’s

decision in this docket and future dockets dealing with the structure of the communications industry.

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COMMENTS OF U S WEST, INC.

U S WEST, Inc. ("U S WEST"), hereby offers the following comments on the Federal Communications Commission's (or "Commission") Notice of Proposed Rulemaking in the above-captioned docket.¹ The Notice seeks comment on whether Computer II structural separation, or some variant thereof, should be imposed on those Regional Bell Operating Companies ("RBOC") who desire to offer services defined by the Commission as "enhanced."² The Notice is occasioned by the Ninth Circuit Court of Appeal's decision reversing the analytical premises for structural relief in California III.³

¹ In the Matter of Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services, CC Docket No. 95-20, Notice of Proposed Rulemaking, FCC 95-48, rel. Feb. 21, 1995 ("Notice").

² Id. ¶ 2.

³ See People of State of Cal. v. FCC, 39 F.3d 919 (9th Cir. 1994), cert. denied, 1995 U.S. Lexis 2435 (U.S. Apr. 3, 1995).

I. INTRODUCTION

Structural separation issues have been alive and actively debated at the Commission for almost three decades, with the result that many suppositions, assumptions and conclusions about structural separation as a beneficial regulatory device in today's telecommunications market have become almost generally accepted as truths, even though they are often palpably and demonstrably false.⁴ In reality, it turns out that the regulatory structural separation device is almost entirely pernicious and destructive of the public good, and yet it retains numerous fervent advocates, many of whom will no doubt reappear in this proceeding. These comments attempt to redirect the form of the argument to economic, market and technological reality in order to assist the Commission in laying the groundwork for a regulatory structure which can function in a meaningful and salutary fashion in the modern era.

For purposes of these comments, we will assume that the open network architecture ("ONA") nonstructural safeguards structure currently in place⁵ provides

⁴ Chairman Hundt, in a speech to the Communications Workers of America, indicated to the contrary when he observed: "But as we have gained experience in regulating the BOCs under those structural separation requirements, and as a result of our devising strengthened non-structural safeguards against cross-subsidies, we have moved away from the structural separation approach. My own view is that the FCC should be able to choose between structural and non-structural safeguards to protect new competitors from predatory pricing." See Speech by Reed E. Hundt, Chairman, Federal Communications Commission, to the Communications Workers of America, AFL-CIO, CLC, 1995 Legislative-Political Conference, Washington, D.C., Apr. 3, 1995.

⁵ In point of fact, the ONA structure remains in place despite the Ninth Circuit Court's decisions in California II and California III. The actual Memorandum Opinion and Order granting structural relief is pending before the D.C. Circuit Court of Appeals at this time.

the optimal regulatory structure to permit market forces to maximize consumer welfare through meaningful and pro-competitive participation in the enhanced/information services marketplace.⁶ In point of fact, there is much in the current ONA structure which can be improved -- hardly a surprising result now that actual experience operating in an ONA environment is producing operational data. But ONA is clearly premised on correct economic analysis, and we view this docket as an opportunity to reaffirm with finality the correctness of regulations based on proper economics. Regulatory structural separation, on the other hand, is contrary to rational economic analysis and harmful to consumers and the nation as a whole. Details of the actual ONA regulatory structure can be fine tuned in other dockets in the future.

The primary focus of this filing is the presentation of economic, market and financial analysis of the role of integrated RBOC enhanced operations in today's telecommunications marketplace, and the disruptive effects of Computer II separate subsidiary operation. These studies, conducted by three independent experts, plus an internal U S WEST study, approach structural separation from a variety of perspectives. The Booz-Allen & Hamilton Study⁷ examines the performance of the enhanced service markets during the recent time period when RBOCs were permitted

⁶ While the Commission has separated ONA and structural relief, the two issues are in reality inseparable. In these comments we refer to the entire set of ONA and non-structural rules regarding enhanced services as "ONA." See In the Matter of Computer III Remand Proceedings, Report and Order, 5 FCC Rcd. 7719, 7720 ¶ 7 (1990).

⁷ See Attachment 1, The Benefits of RBOC Participation in the Enhanced Services Market, Booz-Allen & Hamilton Inc., dated Apr. 4, 1995 ("Booz-Allen Study").

to provide integrated enhanced services. The Booz-Allen Study concludes that the market (particularly the voice messaging market) is more robust and competitive, with lower prices and a wider variety of services, than would have been the case had RBOCs not participated. Of particular interest in the Booz-Allen Study is the conclusion that a variety of rural and low-income consumer groups would not have been served in the voice messaging service arena if the RBOCs had been precluded from participation. A study prepared by Jerry A. Hausman and Timothy J. Tardiff⁸ also examines the voice messaging service market and verifies the conclusions in the Booz-Allen Study. The Tardiff Study goes on to examine the economic costs to consumers of structural separation, concluding that structural separation in the telecommunications market would (and has in the past) cost consumers billions of dollars. Concluding that Computer II structural separation will add at least 30% to RBOC costs of developing and marketing enhanced services to the public, the Tardiff Study posits genuine harm to be caused by a return to the Computer II structural separation environment. Finally, a study by RRC, Inc. examines economic theory and performance in other industries to verify that RBOC natural efficiencies of integration (primarily economies of scale) are fundamentally pro-competitive and pro-consumer.⁹ The RRC Study likewise verifies that significant economies which benefit the public in a competitive market can be lost if corporate structure is

⁸ See Attachment 2, Benefits and Costs of Vertical Integration of Basic and Enhanced Telecommunications Services, dated Apr. 6, 1995 ("Tardiff Study").

⁹ See Attachment 3, The Economics of Structural Separation from the Perspective of Economic Efficiency, Final Report, RRC, Inc., dated Apr. 4, 1995 ("RRC Study").

driven by regulation. All of these studies agree that, to the extent the RBOCs have any residual incentive to behave anti-competitively in the enhanced services field, the ONA structure has been quite successful in preventing such discrimination. This conclusion is confirmed by a detailed review of U S WEST's own ONA compliance efforts.

The bottom line is that there is no conceivable reason, and certainly no evidence to justify a return to the world of structural separation. In this docket the Commission should confirm this fact as quickly as possible.

II. INTEGRATION OF RBOC ENHANCED SERVICES FURTHERS COMPETITION AND BENEFITS CONSUMERS

In this section we briefly discuss the analysis of the independent experts who have examined the structural separation issue. We do so from two perspectives: (1) U S WEST's integrated enhanced services (primarily Voice Messaging Service) have benefited competition and consumers and; (2) the benefits which have accrued from U S WEST's participation in the enhanced service market would not -- indeed could not -- have occurred under a Computer II structural separation regime. Inherent in this section is recognition of the fact that U S WEST has not disrupted competition in the enhanced service market during its offering of integrated enhanced services -- in fact, U S WEST's enhanced service operations have materially contributed to a more robust and competitive enhanced service marketplace than would have existed in the absence of U S WEST's participation.

Before considering the economics of structural separation, it is important to realize that a return to Computer II structural separation would be destructive of intelligent network operations as well. The Computer II rules define the telecommunications market as consisting primarily of three elements: (1) basic common carrier transmission services; (2) enhanced services -- computer-driven enhancements which act on basic transmission services; and (3) customer premises equipment -- any telecommunications equipment (with some exceptions) which physically resides on the premises of a customer. The "bright line" between basic and enhanced services which the Commission had originally envisioned in Computer II¹⁰ has become increasingly blurred.¹¹ Specifically, in a data communications world, many computer functions which appear to fit within the definition of an enhanced service are essential to a modern and competitive data network. The current controversy over whether carrier-provided frame relay service might be an enhanced service in its entirety, despite the fact that what was considered to be basic transmission at the time of the Computer II decision clearly exists within written frame relay service, highlights this issue. In a Computer II structure, U S WEST could be required to split the basic and enhanced elements of frame relay service between two structurally separate corporations -- clearly an action which would be seriously

¹⁰ See In the Matter of Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), Final Decision, 77 FCC 2d 384, 417-23 ¶¶ 86-101 (1980).

¹¹ See In the Matter of North American Telecommunications Association Petition for Declaratory Ruling Under Section 64.702 of the Commission's Rules Regarding the Integration of Centrex, Enhanced Services, and Customer Premises Equipment, Memorandum Opinion and Order, 101 FCC 2d 349 (1985).

inefficient, if not impossible. The ability of asynchronous transfer mode ("ATM") technology to support multiple protocols would likewise not be intelligently accommodated if the enhanced aspects of ATM were to be structurally separated via the Computer II rules. In fact, practically all modern data communications services will need to include at least some enhanced elements because of the nature of high speed data connections, which would make return to Computer II structural separation hopelessly inefficient.

In short, the nature of modern telecommunications and networks makes Computer II structural separation a particularly bad regulatory device. Clearly, utilizing a corporate structural separation rule to govern a carrier's operation of its data networks -- putting different parts of the same network in different subsidiaries, such as was attempted a decade ago with packet switching access protocols -- would be fundamentally destructive and arbitrary. Under ONA and structural integration, enhanced or basic classification becomes far less important, because a carrier can still offer the two together as part of one network, subject to the unbundling and other rules which make up the ONA structure.

However, even if protocol conversion and other network derivative enhanced services could remain integrated, fundamental economic analysis dictates against use of a separate subsidiary requirement as a regulatory tool. The RRC Study describes graphically the economic harm that mandatory structural separation can wreak.¹² The RRC Study observes that, because both basic and enhanced telecom-

¹² See Attachment 3, RRC Study at Appendix B.

munications services are computer dependent, “[s]tructural separation would eliminate the existence of cost complementarities in the provision of enhanced services.”¹³

The result of this enforced diseconomy:

The ensuing higher costs would result in either higher prices of those services that are brought to market or the exclusion of services whose expected returns fail to meet corporate standards. In either situation, consumer welfare would be reduced.¹⁴

In the key area of new product development and innovation, the RRC Study concludes that “[t]o maintain strict separation is to eliminate much of the engine of invention.”¹⁵ Essentially, the RRC Study concludes that a mandatory separate subsidiary drives toward inefficiency, deliberately seeking to create a situation where “[t]he resulting separate BOC enhanced services subsidiaries . . . were no more efficient than other ESPs.”¹⁶

The RRC Study then proceeds to review the economic factors which often lead regulators to consider separate subsidiaries (cross-subsidization and discriminatory access) and concludes that these factors have little relevance in today’s telecommunications world.¹⁷ This irrelevance is not so much a result of the decreased RBOCs’ ability to discriminate or cross-subsidize (although this power is decreasing), as it is

¹³ Id. at 7.

¹⁴ Id.

¹⁵ Id. at 8.

¹⁶ Id. at 25.

¹⁷ Id., Appendix B at 36-47.

a result of a lack of economic incentives to engage in such conduct. Fundamentally, the RRC Study concludes that there is very little economic advantage to be gained via either access discrimination or cross-subsidization in today's telecommunications market, especially given the extremely high probability that any serious misconduct will be detected.¹⁸

The RRC Study concludes with a brief analysis of regulatory efforts to manage competition via control of firm structure in other industries -- branch banking in Texas, gas pipelines and airlines.¹⁹ In each of these industries, the structural regulations, while well intentioned and perceived as pro-competitive, actually had the result of impeding competition and reducing consumer welfare.

In order to examine the costs of structural separation in its own business, U S WEST conducted an internal study of the one-time costs which would be incurred if it were to create a fully separate subsidiary whose sole purpose was to deliver enhanced services to the public.²⁰ Assuming that the separate entity would employ 2,500 people (the smallest number which was deemed reasonable for a U S WEST affiliate on a long-term basis), this study concluded that the one-time costs of establishment of such a subsidiary, are between \$59 and \$90 million. These costs are the start-up costs of a new subsidiary which is required to operate totally

¹⁸ Id. at 16, 25.

¹⁹ Id. at 29-33.

²⁰ See Attachment 4, Structural Separation of Enhanced Service Offerings, U S WEST Management Information Services, dated Mar. 29, 1995.

independently, thus incurring significant costs for office space, systems, telecommunications equipment, etc. The number does not reflect increases in ongoing operating costs caused by operational inefficiencies which Computer II separation imposes.

Against this background, the Tardiff Study examines the economics of the enhanced services industry, concluding that “BOC participation in the enhanced services market has been good for consumers.”²¹ The Tardiff Study focuses on voice messaging service, the one enhanced service with significant RBOC participation, and concludes:

Lower prices, increased competition, and development of a new market segment have been the result of BOC entry into the voice messaging segment of the enhanced services market.²²

Reviewing the delays in the introduction of exchange carrier voice messaging service occasioned by regulation (Computer II plus Modification of Final Judgment (“MFJ”)), the Tardiff Study concludes that “the combined effect of the Computer II decision and the MFJ caused voice messaging not to be offered to residential and small customers by the BOCs.”²³ The Tardiff Study calculates that effective RBOC voice messaging service operation commenced in 1990.²⁴ The cost to consumers of the regulatory delay in voice messaging calculated by the Tardiff Study:

²¹ See Attachment 2, Tardiff Study at 4.

²² Id. at 10.

²³ Id. at 13.

²⁴ Id.

\$5.7 billion. Taking a broad view, the Tardiff Study estimates that regulations which prohibit or impede introduction of new telecommunications services by RBOCs could cost consumers between \$50 and \$100 billion per year.²⁵ A key part of the potential for consumer loss is regulatory structural separation of RBOC basic and enhanced services, which the Tardiff Study estimates can add 30% to RBOC enhanced service production costs.²⁶ Obviously, a Computer II separate subsidiary rule would be unlikely to cost consumers the full \$50 - \$100 billion loss estimated by Tardiff, but the magnitude of Tardiff's numbers give some idea of the danger which such a rule would pose for society.

The RRC and Tardiff analyses are brought home in a very practical way by the Booz-Allen Study. The Booz-Allen Study examines the enhanced services market, particularly the market for voice messaging and enhanced FAX services, and concludes that RBOC participation in the enhanced services market on an integrated basis has contributed to the public good and has not harmed competitors at all. Indeed, the Booz-Allen Study concludes that U S WEST's integrated enhanced service offerings have greatly benefited competitors, rather than harmed them. Perhaps most significantly, the Booz-Allen Study describes geographic and demographic groups served by U S WEST's voice messaging services which would not be served to the same extent as they are today if U S WEST were excluded from the voice messaging market. Taking 1990 as a starting point for the commencement of

²⁵ Id. at 19.

²⁶ Id. at 21.

U S WEST integrated enhanced service offerings (recognizing that, as a practical matter, only protocol conversion and voice messaging commenced as early as that date), the Booz-Allen Study reaches the following conclusions:

- Since 1990, total United States enhanced service revenues have achieved a CAGR of 18.18 %, and the total market was worth over \$26.5 billion in 1994.
- There are numerous current enhanced service providers, including MCI, Sprint, AT&T, CompuServe, Prodigy, America Online, Dow Jones, Dun and Bradstreet, Reuters, VISA, etc.
- RBOCs currently have very little share of the enhanced service market, with the exception of voice messaging.
- RBOCs have experienced dramatic growth in the voice messaging area, going from a customer base of practically zero in 1990 to more than five million subscribers in 1994.
- Practically all RBOC voice messaging service has been to residential and small business subscribers, with the result that the number of residential voice messaging subscribers has almost quintupled, and the number of small business subscribers more than doubled, since 1990.
- RBOC voice messaging service has generally been of the mass market variety, priced low to reach that market. This RBOC competition has resulted in a dramatic decrease in voice messaging prices among all competitor segments.
- Competing voice messaging suppliers continue to flourish in the face of this competition, primarily through innovative offerings and reduced prices.
- U S WEST's voice messaging offerings have reached rural, low income, and ethnic customers with services which might not have been available to them in the absence of U S WEST's presence in the market.
- In one area where U S WEST spent heavily on advertising but was unable to market its product successfully (fax services), the competitors reaped a windfall because U S WEST's advertising created a public demand for a service which was translated into sales by U S WEST's competitors.

In other words, the integrated presence of U S WEST and the other RBOCs in the enhanced services market, particularly the voice messaging market, has been an unmitigated benefit to the public, to competition, and even to competitors. Many, if not most, of these benefits would have been denied to the public had U S WEST and the other RBOCs been excluded from the enhanced services market, or forced to operate inefficiently by a regulatory separate subsidiary requirement. It would be a terrible mistake for the Commission to take action which would have the effect of depriving the public of similar benefits of RBOC competition in the future as new RBOC enhanced services are developed and brought to the market.

III. THE COMMISSION SHOULD NOT ATTEMPT TO DRAW A LINE TO PERMIT INTEGRATION OF ONLY SOME, BUT NOT ALL, ENHANCED SERVICES

One of the questions raised in the Notice is whether the Commission could reasonably take some enhanced services (where there are few, if any, complementarities), and put them in a separate subsidiary, while permitting integration of those enhanced services where integration actually could benefit the public.²⁷

There is a certain superficial appeal to this concept. U S WEST itself makes use of the corporate subsidiary structure where it makes business sense to do so, and the enhanced service class is so large and diverse that there may be many enhanced services which do not share significant complementarities with the basic telephone

²⁷ Notice ¶ 13.

network (even in today's computer oriented marketplace). There are two problems with this concept.

First, the decision as to which products most lend themselves to joint development, marketing, sale or other aspects of joint operation which result in significant efficiencies is one which is best made by the market, not by regulation. New product development is an extremely dynamic area, and an effort to preassign new products based on old categories is bound to be counterproductive.

Second, for those products for which no major efficiencies of integration can be found, there are few, if any dangers of anti-competitive conduct on account of joint operation. The dangers which structural separation sought to address were caused by the very efficiencies which structural separation denied. If two products are unrelated, the possibility of discriminatory access or cross-subsidization between the two products becomes phantasmagorical.²⁸ Thus, an effort to put only those products in a subsidiary where there are no efficiencies to be lost by structural separation would result in a meaningless exercise, because those products create no competitive dangers. As noted, of course, for those products where there are efficiencies of integration, structural separation is far more costly to the public than any savings which might be realized via protection of competition through that regulatory vehicle.

²⁸ See Chesapeake and Potomac Telephone Co. v. U.S., 830 F. Supp. 909, 929-31 (E.D. Va. 1993).

IV. NON-STRUCTURAL SAFEGUARDS ARE MORE THAN ADEQUATE TO PROTECT AGAINST ANTI-COMPETITIVE CONDUCT BY RBOCS IN THE PROVISIONING OF ENHANCED SERVICES

One issue which this proceeding seeks to address is whether the existing ONA rules, including the unbundling requirements inherent in those rules, provide adequate protection against anti-competitive conduct to warrant allowing RBOCs to continue offering integrated enhanced services.²⁹ Much has been made about the issue of whether, in the absence of Computer II structural separation, consumers might be injured by anti-competitive actions of RBOCs offering enhanced services. Indeed, the gist of the Ninth Circuit's decision in California III is that the Commission did not adequately explain how access discrimination could be prevented in the absence of either structural separation or what the court called "fundamental unbundling."³⁰

It is universally agreed at this time that the two possible reasons for structural separation are potential access discrimination and potential cross-subsidization of enhanced services by RBOC basic regulated monopoly services. Because the Ninth Circuit agreed that the Commission had adequately addressed the issue of potential cross-subsidization, we focus herein primarily (although not exclusively) on the possibility of U S WEST's engaging in access discrimination (providing more favorable access to its basic network to its own enhanced services

²⁹ Notice, ¶ 12.

³⁰ See People of State of Cal. v. FCC, 39 F.3d at 927.

than is available to competitors) if it is free to market enhanced services without the burden of Computer II structural separation. In fact, we submit that the existing ONA safeguards, including the existing level of unbundling under those safeguards,³¹ provide superior protection to competition and the public good than could separate subsidiary rules.

Actually, the realistic possibility that U S WEST will engage in access discrimination in an integrated enhanced services environment is completely discredited by U S WEST's experience with integrated operations (and the experience of the Commission with the totality of integrated operations). U S WEST has offered integrated CPE since 1988, and has been the target of no complaints about access discrimination. U S WEST has offered integrated enhanced services since 1990, and has likewise been the target of no complaints about access discrimination.³² As far as we can determine, the other RBOCs have had similar experience -- no or very few complaints over the same period of time.³³ GTE, Inc. ("GTE") has not had a separate subsidiary requirement since the inception of Computer II and has had, based on the public record, no complaints of access discrimi-

³¹ See Section V infra.

³² By complaints, we refer to complaints to the Commission or a state regulatory body. Obviously we do not mean to imply that all U S WEST enhanced service customers are happy with their service 100 percent of the time, or that these customers have not complained at times to U S WEST. In addition, non-specific "complaints" filed in dockets asserting general or unidentifiable "misconduct" are not considered to be "complaints."

³³ The BellSouth Memory Call proceeding, relied on so heavily by the Ninth Circuit, strikes us as more a matter of regulatory disagreement than actual misconduct. We will allow BellSouth to elaborate on Memory Call. See People of State of Cal. v. FCC, 39 F.3d at 929.

nation either. In other words, there is no evidence at all that U S WEST can or will abuse whatever ability it has to disrupt competition when it offers integrated enhanced services.

To the contrary, there is powerful evidence that indicates that U S WEST has not discriminated in the provision of access to its basic network to its own competitive enhanced services, and that U S WEST has not cross-subsidized its integrated enhanced services.

First, the very growth of a flourishing enhanced services industry during the period since U S WEST and other RBOCs commenced offering integrated enhanced services is strong testament to the fact that U S WEST and other RBOCs (and GTE, as well, for that matter) are not impeding competition. Surely, if the RBOCs had the incentive and ability to disrupt enhanced service competition on account of their integrated operations, at least some negative impact on the market would now be evident. As is pointed out in the RRC, Tardiff, and Booz-Allen studies, exactly the opposite has happened, and the enhanced service industry is healthier today than it was before integrated RBOC enhanced operations began.

Second, as is pointed out by the RRC Study, U S WEST does not have a serious incentive to discriminate against competing enhanced service providers in the provision of access. The economics of access are such that access discrimination would cost U S WEST money, not make money.³⁴ Moreover, as the RRC Study

³⁴ Indeed, RRC similarly finds that U S WEST does not have meaningful incentives to “cross-subsidize” unprofitable enhanced services either. See Attachment 3, RRC Study at 15 and Appendix B at 38-41.

points out, the likelihood of any actual access discrimination going undetected in today's environment is almost zero.³⁵ Hence, access discrimination would be a futile act, almost immediately harmful to the company, and there would be little economic motivation for U S WEST to adopt a plan or policy based on such discrimination.

Third, while the separate subsidiary structure may make cross-subsidization easier to detect,³⁶ it does nothing at all to reduce the risk of access discrimination. As the RRC Study notes, access discrimination incentives, should they exist, are in no way diminished by a separate subsidiary structure.³⁷ Hence, a separate subsidiary rule would not address the only issue now under review.

Fourth, ONA compliance has been a matter of top priority for U S WEST since the inception of ONA. Compliance is overseen by a full-time ONA compliance team, detailed compliance procedures are in place and enforced, ONA training is mandatory and frequent, and all U S WEST personnel are advised that a violation of the ONA rules can result in disciplinary action as severe as dismissal from the company. In order to capture some sense of the role of ONA compliance in U S WEST's overall strategy, we attach hereto a brief synopsis of the existing U S WEST ONA compliance infrastructure.³⁸

³⁵ Id. at 16.

³⁶ Id. at 17.

³⁷ See Attachment 3, RRC Study at 17.

³⁸ See Attachment 5, ONA Compliance at U S WEST.

In this regard, we do not further examine in these comments the details of current Commission ONA compliance rules. The rules address the right issues -- access discrimination and cross-subsidization -- and can certainly claim to have played some part in the extraordinarily salutary development of the enhanced services market during the period of RBOC integrated operations. While some of the rules are overly restrictive and, accordingly, counterproductive (in that they impede competition), such defects in the rules are minor compared to the separate subsidiary rules which Computer II had formerly imposed on the RBOCs. Accordingly we reserve for future proceedings our comments on how the rules might be improved.

V. THE CURRENT ONA RULES PROVIDE FOR REASONABLE UNBUNDLING OF BASIC SERVICES

The sole issue on which the last structural relief order was reversed was the perceived failure of the Commission to explain how access discrimination could be prevented in the absence of what the court called “fundamental unbundling” of the basic network.³⁹ The court reasoned that the Commission had made such “fundamental unbundling” a part of the protection against discriminatory access in the earlier ONA decision which the court had vacated.⁴⁰ The court further found that “fundamental unbundling” was not part of the current structural relief order.⁴¹

³⁹ See People of State of Cal. v. FCC, 39 F.3d at 933.

⁴⁰ Id. at 930.

⁴¹ Id.

Hence, the Commission was directed to explain how, in the cost-benefit analysis that the court saw fit to read into the Commission's obligations in addressing structural relief procedural issues, access discrimination would be prevented in the absence of "fundamental unbundling," or at least how the cost benefit analysis would or would not be altered by the perceived Commission change of position.⁴² As noted previously, the benefits of integrated operation are clear, and do not change per se depending on the degree of unbundling - although, in an ONA context, market driven unbundling can itself promote competition.

While U S WEST is of the firm belief that the court was wrong and that no "fundamental unbundling" requirement was ever part of the relief from the Commission's separate subsidiary rules, the court's concern is easily met. There seems to be no question but that unbundling along market lines is generally salutary, but that artificial unbundling along lines established by a regulator (or, perhaps, an ill-motivated competitor seeking to disrupt an RBOC's service for anti-competitive ends) can be expensive and counterproductive.⁴³ Rather, unbundling based on real market demands is far superior to regulatory unbundling.⁴⁴ The current ONA rules accomplish precisely the market driven unbundling which represents the proper approach to the issue. Namely, enhanced service providers request new ONA services based on their individual needs and desires. U S WEST processes these re-

⁴² Id.

⁴³ See Attachment 3, RRC Study at 19.

⁴⁴ Id.

quests based on market demand, economic feasibility and technological feasibility. If U S WEST wrongfully denies a new unbundled ONA service to an ESP, the ESP may seek the aid of the Commission.⁴⁵ U S WEST reports on its disposition of all requests for new ONA services every year. To date, U S WEST has received 73 requests for new ONA services from outside ESPs, and 33 from its internal enhanced service operations (U S WEST requires that its internal operations follow the same procedure in seeking new ONA services as is followed by competitors). Of these, 32 of the requests from outside vendors have been fulfilled. Three of the requests from U S WEST's internal enhanced service operations have been filled, but U S WEST cannot use these now tariffed services because ONA plan amendments were not granted and CEI plan amendments are pending.

Unlike "fundamental unbundling" (which we read to connote unbundling based upon regulatory directives, rather than market realities, the ONA requirements have been carefully tailored by the Commission to ensure that the interconnection needs of competitive enhanced service providers are met in a reasonable and nondiscriminatory fashion. As such, the unbundling required in the current ONA rules is more effective in meeting enhanced service provider needs and concerns than would be a more general and undefined "fundamental unbundling." By putting the spotlight on the interconnection needs and desires of enhanced service

⁴⁵ An elaboration of these rules can be found in In the Matters of: Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry); and Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Thereof, Communications Protocols under Section 64.702 of the Commission's Rules and Regulations, Report and Order, 104 FCC 2d 958, 1065-66 ¶¶ 217-218 (1986).